1986

State of Utah v. Leonard Scott : Brief of Respondent

Utah Supreme Court

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860284 IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	Case No. 860284
vs.	:	
LEONARD SCOTT,	:	Category No. 2
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF DISTRIBUTING A CONTROLLED SUBSTANCE FOR VALUE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a)(ii) (1953, AS AMENDED), IN THE SIXTH JUDICIAL DISTRICT COURT, IN AND FOR SEVIER COUNTY, STATE OF UTAH, THE HONORABLE LOUIS G. TERVORT, JUDGE, PRESIDING.

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The following issues are presented in this appeal:

1. Was the jury improperly instructed that it could convict defendant of distributing a controlled substance for value, if the jury found, in accordance with Utah Code Ann. § 76-2-202 (1978), that defendant had aided or abetted others to commit the crime?

2. Should this Court reverse defendant's conviction on grounds that the evidence was insufficient to support his conviction?

3. Should this Court dismiss defendant's argument that the trial court had no authority to order him to reimburse Sevier County for fees paid to his trial counsel?

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BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Defendant was convicted of distribution of a controlled substance for value, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1953, as amended), in a jury trial held March 19, 1986, in the Sixth Judicial District Court, in and for Sevier County, State of Utah, the Honorable Louis G. Tervort, Judge, presiding. Defendant was sentenced by Judge Tervort on April 6, 1986, to serve a term of zero to five years in the Utah State Prison and ordered to pay a fine of $5,000.00. Both the prison sentence and fine were suspended upon condition that defendant complete a two year period of probation.

STATEMENT OF FACTS

On February 15, 1985, Officers Tom Jensen and Delbert Lloyd of the Sevier County Sheriff's Office arranged to have an informant, Doug James, purchase marijuana from defendant. The

officers searched Mr. James and his vehicle thoroughly to be sure that he did not already possess any controlled substances, they had Mr. James wear an electronic listening device, and they gave him forty dollars to make the purchase (T. 48).

The officers sat nearby in a vehicle, monitoring the listening device, as Mr. James entered defendant's residence and negotiated the sale of marijuana (T. 49). Both Officer Jensen and Officer Lloyd had had numerous personal contacts with defendant and recognized his voice as he spoke with Mr. James (T. 54, 67). In response to Mr. James' asking whether he had any "weed" for sale, defendant said that he would sell James a bag for forty dollars (T. 54-55, 67). There was some haggling over the price, because the bag was light, and finally defendant agreed to sell the bag for thirty dollars (T. 54-55, 67). The officers heard further conversation indicating the culmination of the sale, then Mr. James left. Mr. James gave the officers ten dollars change from the forty he had been given and handed them a bag of what proved to be marijuana (T. 49-50, 68, 78).

At trial, in addition to the two police officers, the State called a man named Mickey Sampson to the witness stand. Mr. Sampson had been with defendant at the time Mr. James approached him to buy marijuana. Mr. Sampson admitted that prior to trial he had told the police that he had personally seen defendant give Mr. James the bag of marijuana in exchange for cash (T. 85). Nevertheless, Mr. Sampson testified at trial that he did not actually see the money and marijuana change hands (T. 85). Sampson said that he, defendant, and others had been

playing chess and watching television in defendant's living room (T. 86-87). There was a bag of marijuana on a table in front of the television and, when Mr. James arrived, defendant and Mr. James smoked a joint that had been rolled from the bag (T. 79, 88-89). Mr. James asked if he could buy some marijuana and discussed prices with defendant (T. 79-80). Mr. Sampson testified that, while he did not actually see the transaction take place, he believed that defendant sold the bag of marijuana to Mr. James (T. 85-86).

The jury convicted defendant of distribution of a controlled substance for value, and defendant was sentenced to a two year period of probation (T. 30-31).

SUMMARY OF ARGUMENTS

Defendant's conviction of distributing a controlled substance should be affirmed, because the trial court did not commit reversible error in instructing the jury.

Because defendant has not provided any analysis in support of his argument, and because the evidence presented at trial was in fact sufficient to support his conviction, his claim that the evidence was insufficient should be rejected.

Because it is not supported by any legal reasoning or analysis, defendant's argument, that the trial court had no authority to order him to reimburse Sevier County for fees paid to his trial counsel, should be rejected.

ARGUMENT

POINT I

DEFENDANT'S CONVICTION SHOULD NOT BE REVERSED ON GROUNDS THAT THE JURY WAS IMPROPERLY INSTRUCTED.

Defendant was convicted of distributing a controlled substance for value, in violation of Utah Code Ann. § 58-37-8(1)(a)(ii) (1953, as amended) [hereinafter "Distributing"].[1] Defendant contends that the trial court committed reversible error when, quoting Utah Code Ann. § 76-2-202 (1978) verbatim, the court gave the jury the following instruction:

> Every person acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct, which constitutes an offense shall be criminally liable as a party for such conduct.

(Jury Instruction No. 22).[2] This argument should be dismissed.

In support of his argument that he was improperly convicted of Distributing, defendant relies upon State v. Hicken, 659 P.2d 1038 (Utah 1983). In that case, defendant Hicken acted as a middle man, arranging for a drug dealer named Larsen to sell two lids of marijuana to an undercover agent. Although Hicken never took part in the exchange of cash and contraband between Larsen and the agent, he was charged with Distributing. The district court dismissed the Distributing charge on grounds that Hicken should have been charged with arranging a sale under Utah Code Ann. § 58-37-8(1)(a)(iv) (1953, as amended) [hereinafter

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[1] Section 58-37-8 of the Utah Code is included in appendix A of the addendum to this brief.

[2] The record provided by defendant on appeal does not contain the instructions given to the jury. For purposes of argument, however, the State assumes that "Addendum Number 1" of appellant's brief contains accurate copies of the instructions actually given.

"Arranging"]. Rejecting the State's argument on appeal that Hicken could properly be found guilty of Distributing by applying § 76-2-202, the general aiding and abetting statute in the Criminal Code, this Court stated, "The Controlled Substances Act [Title 58, Chapter 37], expressly and specifically sanctions the offense of arranging for the distribution of a controlled substance. It thus displaces in that fact situation the general sanction for aiding another provided in § 76-2-202 of the Criminal Code." 659 P.2d at 1040 (emphasis added).[3]

The present case is distinguishable from Hicken. There is no evidence that defendant acted as a middle man or go-between for anyone else. This is not a case where defendant must have been charged with Arranging instead of Distributing. Informant Doug James entered defendant's residence and asked whether defendant himself had any marijuana for sale (T. 67). Defendant and Mr. James haggled over prices, and the sale was made (T. 67). All indications were that defendant sold the marijuana to Mr. James. However, the State faced a dilemma: there was no direct testimony that defendant was the one who physically handed the marijuana to Mr. James in exchange for cash, and at trial defense counsel raised the argument that it might have been someone else

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[3] Subsequent to Hicken, this Court reversed a Distributing conviction in State v. Ontiveros, 674 P.2d 103 (Utah 1983). Because §76-2-202 concepts of aiding and abetting were not at issue in that case, and because the factual situation of that case is quite dissimilar to the present case, Ontiveros does not appear to be helpful in deciding the issues raised on this appeal. Moreover, the State believes that Ontiveros was improperly decided and has urged this Court to overturn that decision. See, e.g., Brief for Respondent at 6-10, State v. Fixel, No. 860151 (Utah filed August 22, 1986).

in the room who actually delivered the contraband into Mr. James hands (e.g., T. 70).[4] Even assuming the defendant was not the one who actually delivered the drugs to the buyer, agency is not a defense for offenses charged under the Utah Controlled Substances Act. State v. Casias, 567 P.2d 1097 (Utah 1977); Utah Code Ann. §58-37-2(6) (1953 as amended). Most likely the prosecutor was not aware of Casias and §58-37-2(6) and thus referred to §76-2-202 which properly set forth the law of aiding and abetting. The prosecutor's use of §76-2-202 should be considered a technical mistake and not reversible error. Further, the circumstantial evidence in this case is sufficient to prove that defendant received the money for the drugs. At the very least, defendant acted as a joint participant in distributing the marijuana and, under the circumstances, it was proper for the trial court to instruct the jury that defendant could be found guilty if he physically delivered the contraband, or if (pursuant to § 76-2-202) he commanded, encouraged or intentionally aided others to make the sale.

Defendant interprets Hicken as standing for the proposition that accomplice liability under § 76-2-202 can never arise in connection with Distributing, in violation of § 58-37-8(1)(a)(ii). Defendant misreads Hicken and overlooks this

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[4] The State did not call Mr. James to testify, because the police officers had promised Mr. James that, if he cooperated in buying drugs from defendant, he would not be called as a prosecution witness (R. 41). And, as noted above, Mickey Sampson, while admitting that he had previously told the police that he had seen defendant and Mr. James exchange marijuana for cash, denied at trial that he had seen the actual exchange take place (R. 85).

Court's highly pertinent ruling in State v. Jeppson, 546 P.2d 894 (Utah 1976). In Jeppson, which involved a conviction for the distribution for a controlled substance for value, the defendant claimed--as does defendant here--that the Controlled Substances Act defined completely all culpable conduct and therefore a jury instruction incorporating the language of § 76-2-202 of the Criminal Code was improper. This Court disagreed and stated in reference to the jury instruction in that case:

> The first paragraph of Instruction 6B incorporates, in haec verba, provisions of 76-2-202. It is applicable here, because the Controlled Substance Act does not specifically provide otherwise, nor does its context otherwise require.

State v. Jeppson, 546 P.2d 894, 898 (Utah 1976). See also Greaves v. State, 528 P.2d 805, 807 (Utah 1974); Howe v. Jackson, 18 Utah 2d 269, 421 P.2d 159, 161 (1966). And in Hicken, this Court explained Jeppson as follows:

> Jeppson, supra, is distinguishable from the case under review. There the defendant was charged with aiding another because he had knowingly and intentionally made his trailer available to persons unlawfully possessing, using or distributing controlled substances therein. Id. at 895. There are no provisions in the Utah Controlled Substances Act dealing with the offense of providing a place for illegally selling drugs, and therefore the provisions of the Criminal Code may be resorted to. Conversely, the offense of arranging the sale of a controlled substance is clearly included in the Controlled Substances Act so that the governing language of § 58-37-19 comes into play and we do not look outside that Act.

659 P.2d at 1040. It is clear from this Court's ruling in

Jeppson[5] and from the analysis of that case provided in Hicken that, for a variety of circumstances involving violations of the Controlled Substances Act, §76-2-202 concepts of aiding and abetting remain applicable. As this Court stated in Hicken, unless there are specifically conflicting provisions in the Controlled Substances Act--as with the crime of Arranging--, §76-2-202 may be resorted to.

The present case is an example of the proper application of §76-2-202 in connection with the crime of Distributing. Title 58 does not provide a specific, conflicting sanction for situations such as the present one; where there is ambiguity as to whether the defendant--who has never acted as a go-between in arranging for the distribution of contraband--actually made the physical exchange, or whether a co-participant of the defendant might have handed the drugs to the buyer. Had the trial court not given Instruction No. 22, there was a substantial likelihood that the jury would have felt itself required to acquit the obviously culpable defendant, on the mere technicality that it might have been someone else in defendant's party who actually placed the drugs into Mr. James' hands. Instruction No. 22 was properly given, and defendant's argument should be dismissed.

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[5] It appears this Court could have found the defendant in Jeppson guilty of Utah Code Ann. §58-37-8(2)(a)(ii) (1986): that it is unlawful for any owner of a building to permit the same to be occupied by persons unlawfully distributing controlled substances therein. However, Jeppson is still applicable to the instant case since the concept articulated in Jeppson, is correct, i.e. that if a factual situation does not fit within the Controlled Substance Act it is proper to resort to the Criminal Code.

POINT II

DEFENDANT'S ARGUMENT THAT THE EVIDENCE WAS INSUFFICIENT TO CONVICT HIM SHOULD BE DISMISSED.

Without supplying any argument or analysis, under Point II of his brief, defendant affixes the caption "The Evidence Against Defendant was Insufficient as a Matter of Law, to Sustain the Jury Verdict" and string cites four decisions from this Court. There are at least three reasons why this attempt at an argument should be dismissed.[6]

First, defendant's argument should be dismissed, because he has not provided any legal or factual analysis as to why the evidence was insufficient. State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984) ("Since defendant fails to support [her] argument by any legal analysis or authority, we decline to rule on it."). The State should not be put to the task of developing defendant's arguments for him and thereafter demonstrating why the arguments are not valid.

Second, by failing to provide any legal analysis or argument whatever, defendant has not carried his burden of establishing that he was improperly convicted, and for this reason defendant's argument should be rejected. State v. Jones,

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[6] It is difficult for the State to understand why defense counsel raises the arguments that he does under points II and III of his brief. He provides no analysis or argument in support of these contentions, and under his Summary of Argument states, "However, there appears to be nothing in the record to support the remaining points [points II and III] raised by defendant, i.e., insufficiency of the evidence and lack of jurisdiction to order reimbursement for attorney's fees." (Brief of Appellant at 4.) It is unclear why counsel feels obligated to raise arguments on appeal which he himself believes to have no merit.

657 P.2d 1263, 1267 (Utah 1982) ("The burden of showing error is on the party who seeks to upset the judgment.").

And finally, the details set forth and supported by the record in statement of facts of this brief, supra at 1-3, adequately establish that there was sufficient evidence upon which the jury could convict defendant.

POINT III

DEFENDANT'S ARGUMENT, THAT THE TRIAL COURT HAD NO AUTHORITY TO ORDER HIM TO REIMBURSE SEVIER COUNTY FOR THE FEES PAID TO HIS TRIAL COUNSEL, SHOULD BE DISMISSED.

Without supplying any argument or analysis, under point III of his brief, defendant affixes the caption "The Court Below had no Authority to Order Appellant to Reimburse Sevier County for the Fees Paid to Trial Counsel."[7] For reasons similar to those cited by the State in point II of this brief, supra, defendant's argument should be summarily dismissed. He has provided no factual or legal analysis in support of his argument, and the State should not be forced to develop his argument for him. Furthermore, his failure to even attempt to show how there was error in the proceedings below necessitates this Court's rejecting his argument. State v. Amicone, 689 P.2d 1341, 1344 (Utah 1984); State v. Jones, 657 P.2d 1263, 1267 (Utah 1982).

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[7] Defendant is apparently referring to the condition of his probation that he repay the County of Sevier $1,980.00 for costs paid to his counsel at trial. (See R. 30-31.)

CONCLUSION

Based upon the foregoing, defendant's conviction of Distributing should be affirmed.

RESPECTFULLY submitted this 11 day of December, 1986.

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MAILING CERTIFICATE

I hereby certify that I mailed four true and accurate copies of the foregoing brief to David L. Mower, attorney for appellant, 151 North Main Street, P. O. Box 605, Richfield, Utah 84701, postage prepaid, this 11 day of December, 1986.

ADDENDUM

APPENDIX A

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person knowingly and intentionally:

(i) to produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) to distribute for value or possess with intent to distribute for value a controlled or counterfeit substance;

(iii) to possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except under an order or prescription;

(iv) to agree, consent, offer, or arrange to distribute or dispense a controlled substance for value or to negotiate to have a controlled substance distributed or dispensed for value and distribute, dispense, or negotiate the distribution or dispensing of any other liquid, substance, or material instead of the specific controlled substance so offered, agreed, consented, arranged, or negotiated.

(b) Any person who violates Subsection (1)(a) with respect to:

(i) a substance classified in Schedules [Schedule] I or II is, upon conviction, guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;

(ii) a substance classified in Schedules III and [or] IV, or marihuana is, upon conviction, guilty of a third degree felony, and upon a second or subsequent conviction punishable under this Subsection (1)(b)(ii) is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is, upon conviction, guilty of a class A misdemeanor and upon a second or subsequent conviction punishable under this Subsection (1)(b)(iii) is guilty of a third degree felony.

(c) Except as authorized by this chapter, any person who knowingly and intentionally distributes a controlled substance, wherein nothing of value is exchanged for the distribution, is guilty of one degree less than the maximum penalty for the sale of that controlled substance for value.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order or directly from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this subsection;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place, knowingly and intentionally to permit the same to be occupied by persons unlawfully possessing, using, or distributing controlled substances therein;

(iii) for any person knowingly and intentionally to be present where controlled substances are being used or possessed in violation of this chapter and the use or possession is open, obvious, apparent, and not concealed from those present. However, no person shall be convicted under this subsection if the evidence shows that he did not use the substance himself or advise, encourage, or assist anyone else to do so. Any incidence of prior unlawful use of controlled substances by the defendant may be admitted to rebut this defense;

(iv) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance;

(v) for a practitioner licensed under this chapter knowingly and intentionally to prescribe, administer, or dispense a controlled substance to a juvenile, without first obtaining the consent as provided in § 58-1-44 of a parent, guardian, or person standing in loco parentis of the juvenile except in cases of an emergency. For purposes of this subsection, a juvenile means a "child" as defined in Subsection 78-3a-2(3), and "emergency" means any physical condition requiring the administration of a controlled substance for immediate relief of pain or suffering;

(vi) for a practitioner licensed under this chapter knowingly and intentionally to prescribe or administer dosages of a controlled substance in excess of medically recognized quantities necessary to treat the ailment, malady, or condition of the ultimate user; or

(vii) for any person to prescribe, administer, or dispense any controlled substance to another person knowing that the other person is using a false name, address, or other personal information for the purpose of securing the same.

(b) Any person who violates Subsection (2)(a)(i) with respect to:

(i) a substance classified in Schedules [Schedule] I and [or] II, or marihuana, is, upon conviction, guilty of a third degree felony, except that if the amount of marihuana is over one ounce but less than 16 ounces, that person is guilty of a class A misdemeanor. Upon a second or subsequent conviction of possession of any controlled substance by a person having previously been convicted under this Subsection

(2)(b)(i), that person shall be sentenced to one degree greater penalty than provided in this Subsection (2)(b)(i);

(ii) all other controlled substances not included in Subsection (2)(b)(i), including less than one ounce of marihuana is, upon conviction, guilty of a class B misdemeanor, and upon a second conviction for possession of a controlled substance as provided in this Subsection (2)(b)(ii) is guilty of a class A misdemeanor, or upon a third or subsequent conviction is guilty of a third degree felony.

(c) Any person who violates Subsections (2)(a)(ii) through (2)(a)(vii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor;

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person:

(i) who is subject to this chapter to distribute or dispense a controlled substance in violation of this chapter;

(ii) who is a licensee to manufacture, distribute, or dispense a controlled substance to another licensee or other authorized person not authorized by his license;

(iii) to omit, remove, alter, or obliterate a symbol required by this chapter or a rule issued under this chapter;

(iv) to refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter; or

(v) to refuse entry into any premises for inspection as authorized by this chapter.

(b) Any person who violates Subsection (3)(a) shall upon conviction be punished by a civil fine of not more than $5,000. The proceedings shall be independent of, and not in lieu of, criminal proceedings under this chapter or any other law of this state. If the violation is prosecuted by information or indictment which alleges the violation was committed knowingly or intentionally, that person is, upon conviction, guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, or to prescribe or dispense to any person known to be attempting to acquire or obtain possession of or procure the administration of, any controlled substance by misrepresentation, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same or to alter any prescription or written order issued or written under the terms of this chapter;

(iv) to furnish false or fraudulent material information in any application, report, or other document required to be kept by this chapter, or to willfully make any false statement in any prescription, order, report, or record required by this chapter; or

(v) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person who violates Subsection (4)(a), upon conviction, is guilty of a third degree felony.

(5) Prohibited acts E — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Chapter 37a, Title 58, the Drug Paraphernalia Act, or under Chapter 37b, Title 58, the Imitation Controlled Substances Act, shall, upon conviction, be subjected to the penalties and classifications set forth in Subsection (5)(b) if the act is committed:

(i) in a public or private elementary or secondary school;

(ii) on the grounds of such a school;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through such a school;

(iv) within one thousand feet of any structure, facility, or grounds included in Subsections (5)(a)(i), (ii), or (iii); or

(v) with a person under 18 years of age regardless of where the act occurs.

(b) A person convicted under this Subsection (5) is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this Subsection (5) would have been a first degree felony. Imposition or execution of the sentence shall not be suspended, nor shall the person be eligible for parole until the minimum term of imprisonment under this subsection has been served.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this Subsection (5), a person convicted under this Subsection (5) is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense, or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (5)(a) or was unaware that the location where the act occurred was as described in Subsection (5)(a).

(6) Any violation of this chapter for which no penalty is specifically prescribed is a misdemeanor.

(7) Any person who attempts or conspires to commit any offense made unlawful by this chapter is, upon conviction, guilty of one degree less than the maximum penalty prescribed for that offense.

(8) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by

law. Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) (a) Whenever it appears to the court at the time of sentencing any person convicted under this chapter that the person has previously been convicted of an offense under the laws of this state, the United States, or another state, which if committed in this state would be an offense within this chapter and it appears that probation would not be helpful to the defendant or that probation would be contrary to the interest, welfare, or protection of society, the court, notwithstanding § 77-35-20, may, providing compliance with Subsection (9)(b) has been met, impose a minimum term to be served by the defendant up to one-half the maximum sentence imposed by law for the offense so committed.

(b) Before any person may be sentenced to a minimum term as provided in Subsection (9)(a), the prosecuting attorney or grand jury, if an indictment, shall cause to be subscribed upon the complaint, in misdemeanor cases, or the information or indictment, in addition to the substantive offense charged, a statement setting forth the alleged past conviction of the defendant and specifically stating the date and place of conviction and the offense of which the defendant was convicted. The allegation shall be presented to the defendant at the time of his arraignment, or thereafter by leave of court, but in no event later than two days prior to the trial of the offense charged or the defendant's entering a plea of guilty. At the time of arraignment or later date when granted by the court, the court shall read the allegation of the previous conviction to the defendant and provide him or his counsel with a copy of the same and explain to the defendant the consequences of the allegation under Subsection (9)(a). The allegation of the past conviction of the defendant is not admissible in a jury trial, except where the admissibility in evidence of a previous conviction is otherwise recognized as admissible by law.

The court, following conviction of the defendant of the substantive offense charged and prior to imposing sentence, shall inform the defendant of its decision to impose a minimum sentence within Subsection (9)(a) and inquire as to whether the defendant admits or denies the previous conviction. If the defendant denies the previous conviction, the court shall afford him an opportunity to present evidence showing that the allegation of the past conviction is erroneous or the conviction was lawfully vacated or the defendant was pardoned. The evidence shall be made a matter of record and following the evidence the court shall make a finding as to whether the defendant has a previous conviction, which finding is final, except for a showing of abuse of discretion. Following the findings by the court the defendant shall be sentenced in accordance with Subsection (9)(a) or under the appropriate penalty provided by law, as the court in its discretion determines.

(c) Any person sentenced on a second offense to probation who violates that probation is subject to Subsections (9)(a) and (9)(b).

(d) Nothing in this section in any way limits or restricts §§ 76-8-1001 and 76-8-1002.

(10) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evi-

dence that the person or persons did so with knowledge of the character of the substance or substances.

(11) Nothing in this section prohibits a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing such substances to be administered by an assistant or orderly under his direction and supervision.